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No. 85-1409

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

-against-

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE CITIES OF NEW YORK, PHILADELPHIA, LOS ANGELES, BOSTON, AND CHICAGO IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, AND RULES

MISCELLANEOUS

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I. Interest of the Amici Curiae

The Cities of New York, Philadelphia, Los Angeles, Boston, and Chicago ("the cities") submit this brief in support of respondent's position that step two of the

Secretary's sequential evaluation process, 20 C.F.R. §§ 404.1520(c) and 416.920(c) ("the severity regulation"), violates Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401 et seq.; 1381 et seq. (1982 & Supp. III 1985) ("the Act") by allowing the Secretary to deny claims for disability benefits without considering the effect of an individual's impairments on his or her ability to work.

The cities seek to protect the interests of their disabled citizens in the fair resolution of claims for disability benefits. Many of their citizens have been injured by the unlawful policy respondent challenges. See Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985), petition for rehearing en banc denied, 776 F.2d 166 (1985), petition for cert. filed, 54 U.S.L.W. 3600 (U.S. March 11, 1986) (No. 85-1442); Smith v. Heckler, 595 F.Supp. 1173 (E.D. Cal. 1984); appeal pending, No. 85-2178; Dixon v. Heckler, 589

F.Supp. 1494 (S.D.N.Y. 1984), aff'd, 785 F.2d 1102 (2d Cir. 1985), petition for cert. filed, 55 U.S.L.W. 3017 (U.S. July 15, 1986) (No. 86-2). The cities also seek to protect their fiscal interests by ensuring that all their citizens who are entitled to federal Social Security disability benefits obtain them instead of continuing to receive state and locally funded public assistance. One effect of the challenged policy has been to shift the costs of caring for needy disabled individuals from the federal government to the amici cities.

The costs to the cities of paying benefits to thousands of individuals whose claims have been denied under the Secretary's illegal policy is substantial.[1]

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[1] By 1982, under the Secretary's severity policy, 40.3% of claims were denied on the (Footnote Continued)

When the costs of caring for these individuals is borne by the federal government, as they should be under the law, the savings to the cities are quite large. For example, approximately 2000 people in New York State, approximately 60% of whom live in New York City, have received about $10 million in benefits under the injunction issued in Dixon. The New York Law Journal, March 18, 1986, at 1. The City of New York thus saves approximately $3,048,000 annually. Other cities save similar amounts.[2]

(Footnote Continued)
ground that the claimant did not have a "severe" impairment. Baeder v. Heckler, 768 F.2d 547, 552 (3d Cir. 1985); Dixon v. Heckler, 589 F.Supp. at 1503-04.

[2] The cities of Philadelphia and Chicago provide food, emergency shelters and medical care for their homeless population, as well as providing social services and emergency food to needy residents. Such programs cost
(Footnote Continued)

This shift of the financial burden of caring for needy disabled individuals from the federal government to the major cities is directly contrary to the intent of Congress, in enacting Titles II and XVI of the Social Security Act. Congress, in fact, enacted Title II and amended Title XVI of the Social Security Act in order to shift the burden of caring for the elderly and disabled from the states and localities to the federal government.[3]

(Footnote Continued)
Philadelphia $18 million in 1985, and Chicago $6.7 million in 1984. The other amici cities provide similar services and incur similar costs. Since some of the recipients of public assistance programs should be receiving Social Security disability benefits, overstrained municipal budgets are relieved of part of their burden when the federal government bears its proper share of caring for needy disabled citizens.

[3] See e.g., S. Rep. No. 1669, 81st Cong., 2d Sess. (1950), reprinted in 1950 U.S. Code, Cong. & Admin. News 3287, (Footnote Continued)

The amici cities have taken the lead in fighting the Secretary's policies that cause this shift. For example, last Term this Court ruled, in a case brought by the City of New York, which was joined by the City of Chicago as amicus curiae, that the Secretary had the duty and the capability to prevent an illegal policy that resulted in the denial of benefits to mentally disabled claimants. The Court affirmed the lower court's order directing the reopening of claims which were denied or terminated on the basis of the illegal policy. Bowen v. City of New York, 54 U.S.L.W. 4536 (U.S. June 2, 1986).

(Footnote Continued)
3287-88; S. Rep. No. 2133, 84th Cong., 2d Sess. (1956), reprinted in 1956 U.S. Code, Cong. & Admin. News 3877, 3879-80; S. Rep. No. 1856, 86th Cong., 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Admin. News 3603, 3622-23; H. Rep. No. 92-231, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code, Cong. & Admin. News 4989, 4992.

SUMMARY OF ARGUMENT

The Secretary's severity regulation violates the Act by denying a claimant the opportunity to prove that his or her impairment is the cause of his or her inability to work. The sequential evaluation process is cut short at step two for those claimants whose impairment is presumed, on medical grounds alone, to be insufficiently severe to be a cause of the inability to work. Those claimants do not get the chance to establish the actual causal relationship between the impairment and the incapacity.

Moreover, the severity regulation violates the burden of proof rules, which the Secretary and the Court of Appeals in every circuit has interpreted the Act to contain. These rules provide that a claimant who has

shown that an impairment prevents him or her from doing past work has made out a prima facie case of disability. The burden shifts to the Secretary to show that the claimant remains capable of performing other work. Under the severity regulation, claimants who cannot show that their impairments are "severe" are not allowed the chance to establish a prima facie claim of disability.

In the alternative, if the severity regulation is to be upheld, it must be narrowly construed as a de minimis screening requirement. The substantial evidence developed in the district courts in cases challenging the severity regulation shows that the Secretary did not apply the regulation as a de minimis standard at the time respondent's case was decided. Given that evidence, respondent's case should be remanded to the district court for a

determination whether the Secretary is indeed now applying a de minimis standard. Moreover, the relief granted in the district courts to class members in the cases challenging the policy who were harmed by the illegal application of the severity regulation must stand.

ARGUMENT

POINT I

THE SECRETARY'S SEVERITY REGULATION VIOLATES THE ACT BY CUTTING OFF THE SEQUENTIAL EVALUATION PROCESS PREMATURELY, AND BY IGNORING LONG-STANDING BURDEN OF PROOF RULES

The Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . . " 42 U.S.C. § 423(d)(1)(A) (1982). For purposes of that definition:

> An individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work . . .

42 U.S.C. § 423(d)(2)(A) (Supp. III 1985). In other words, the statute requires that the Secretary must consider both the nature of

the claimant's impairment, and its effect on his or her ability to work.

The severity regulation provides, however, that the Secretary may find that an individual is not disabled without considering the actual relationship of the impairment to his or her ability to work. The regulation states:

> You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

20 C.F.R. §§ 404.1520(c); 416.920(c) (emphasis in original). The Secretary is to make this finding on the basis of medical grounds alone.

The Secretary's regulation violates the Act because it prevents a claimant from showing that his or her particular disability

is the cause of the inability to work. The regulation, instead of allowing the claimant to establish the causal relationship, as embodied and demonstrated in the facts of his or her own case, requires a claimant to establish, in the abstract and with no relation to those facts, that an impairment is so severe that it could be a substantial cause of inability to work in general.[4] It

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[4] In other words, the statute requires the Secretary to take account of a claimant's age, education, and work experience when considering the severity of a claimant's impairment, while the regulation allows the Secretary to determine severity without considering those factors.

> The statute speaks of an impairment (or impairments) which is 'of such severity that' the claimant cannot, 'considering his age, education and work experience,' perform any substantial gainful work. Under the severity regulation, by contrast, the Secretary had found that plaintiffs do not have severe

(Footnote Continued)

does not allow the claimant a chance to prove that it actually has impaired his or her own ability to work. If a claimant is denied benefits because the impairment is not "severe," the sequential evaluation process ends before the claimant has had a chance to establish this causal relationship.

Truncating the sequential evaluation procedure on this basis violates the burden of proof rules, which all the circuit courts of appeals, and the Secretary, agree are contained in the Act, by preventing claimants who cannot show that their impairments are "severe" from establishing a

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(Footnote Continued)
impairments, and therefore are not disabled, without considering whether their impairments, in light of their age, education and work experience, permit them to perform gainful work.

Dixon, 589 F.Supp. at 1502.

prima facie claim of disability. The twelve circuit courts of appeals are unanimous in holding that the claimant makes a prima facie showing of disability when he or she demonstrates an impairment that prevents him or her from performing previous work. The burden then shifts to the Secretary to show that the claimant remains capable of performing other work considering the claimant's age, education, and work experience. Hernandez v. Weinberger, 493 F.2d 1120, 1122-23 (1st Cir. 1974); Rivera v. Schweiker, 717 F.2d 719, 722-23 (2d Cir. 1983); Choratch v. Finch, 438 F.2d 342, 343 (3d Cir. 1971); Smith v. Califano, 592 F.2d 1235, 1236 (4th Cir. 1979); Lewis v. Weinberger, 515 F.2d 584, 587 (5th Cir. 1975); O'Banner v. Secretary, 587 F.2d 321, 322 (6th Cir. 1978); Whitney v. Schweiker, 695 F.2d 784, 786 (7th Cir. 1982); Garrett v. Richardson, 471 F.2d 598, 603-04 (8th

Cir. 1972); Hall v. Secretary, 602 F.2d 1372, 1375 (9th Cir. 1979); Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984); Francis v. Heckler, 749 F.2d 1562, 1564 (11th Cir. 1985); Meneses v. Secretary, 442 F.2d 803, 806 (D.C. Cir 1971).[5] This formulation of the burden of proof rules has been adopted by the Secretary in his regulations. 43 Fed. Reg. 55359 (November 28, 1978).

Under the severity regulation, however, the Secretary does not allow a claimant the chance to establish a prima facie case. The Secretary does not consider proof that the

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[5] The claimant's burden encompasses the first four steps of the sequential evaluation process. If the claimant gets that far, the burden passes to the Secretary at step five. See Bluvband v. Heckler, 730 F.2d 886, 891 (2d Cir. 1984). If the severity step is truly a de minimis screening device, then it is consistent with the burden of proof rules. See infra at 21-24.

claimant cannot perform his or her prior work if the claimant cannot first satisfy the severity standard, Dixon, 589 F.Supp. at 1505-06, thereby cutting short the sequential evaluation process. See Smith v. Heckler, 595 F.Supp. 1173, 1178 (E.D. Cal. 1984), appeal pending, No. 85-2178.[6]

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[6] Petitoner has never, until this stage of this litigation, challenged the burden of proof rules. Indeed, as noted above, petitioner has adopted them, to the point of treating the severity regulation as consistent with that rule, at least when the claimant's past work had unique features, in their latest "clarification" of the severity policy. SSR 85-28, reprinted in Petition ("Pet.") at 37a, 43a. SSR 85-28 has been read as adopting the burden of proof rules. See McDonald v. Secretary, 795 F.2d 1118, 1126 n.9 (1st Cir. 1986). Nonetheless, in his brief to this Court, petitoner asserts that "[n]othing in the Social Security Act suggests that the disability determination process must be rigidly confined to just two such steps" and that the Act does not "mandate that a claimant may establish a 'prima facie' case by showing that he is unable to do his past relevant work." Petitioner's Brief at 29 n. 15. Petitioner's

(Footnote Continued)

The case histories of the plaintiffs in the various cases challenging the Secretary's severity policy demonstrate that the effect of truncating the sequential evaluation is to deny individuals full consideration of their claims of disability.[7] For example, in Baeder v. Heckler, the Secretary found that a 55-year-old man, suffering from arthritis, diabetes, vertigo, headaches, and chest pains with shortness of breath diagnosed as

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(Footnote Continued)
attempt to overturn this settled body of law should be rejected.

[7] In fact, the Secretary admitted as much in 1980 in commenting on the revisions of the regulations.

> We anticipated that greater program efficiency would be obtained by this provision by limiting the number of cases in which it would be necessary to follow the vocational evaluation sequence....

Dixon v. Heckler, 589 F. Supp. at 1504, quoting 45 Fed. Reg. 55574 (1980).

"significant pulmonary obstructive disease" did not have a severe impairment. Because of this finding, the Secretary did not allow the claimant to demonstrate that his lack of education, his experience of 27 years in the same industrial plant, his attempts to continue working by switching to less strenuous positions, or even his age, contributed, with his impairment, to his inability to work. See Baeder v. Heckler, 768 F.2d 547, 552 (3d Cir. 1985). Had the severity regulation not been applied so as to set an arbitrary "threshold" standard, the Secretary would have considered the correct causal relationship: Mr. Baeder's various physical impairments, combined with his age of 55 years, had forced him to quit working, even though he had attempted to continue working by taking less strenuous positions within his company. He should have been allowed to demonstrate this relationship. See

also Munoz v. Secretary, 788 F.2d 822 (1st Cir. 1986); Mowery v. Heckler, 771 F.2d 966 (6th Cir. 1985).[8]

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[8] The Secretary's policy can also lead to absurd results. For example, the Secretary recently argued that an Administrative Law Judge's decision that an impairment was not severe should be upheld even though the Secretary conceded in his brief to the circuit court that the claimant's impairment met the listings. Williamson v. Secretary, 796 F.2d 146 (6th Cir. 1986). Because the impairment was deemed "not severe", the sequential evaluation process ended at step two, and benefits were denied. The Secretary argued that the fact that the impairment met the listings was "irrelevant" when the sequential evaluation process ended at step two, because the listings are considered at step three. 796 F.2d at 150-51. The court rejected the Secretary's kafkaesque reasoning.

POINT II

THE SEVERITY REGULATION MUST BE CONSTRUED AS A de minimis REQUIREMENT IF IT IS TO BE UPHELD AS CONSISTENT WITH THE SOCIAL SECURITY ACT.

If this Court upholds the severity regulation as consistent with the Act, it must be construed as a de minimis standard. Moreover, if the regulation is allowed to stand, this Court should not limit any of the retroactive relief granted in the cases challenging the severity regulation around the country. The plaintiffs in those cases have shown over and over that the Secretary has not been implementing the severity regulation as a de minimis standard.

The regulatory history of the severity regulation demonstrates that it was originally intended as a de minimis standard. The severity standard was promulgated in 1968,

and revised in 1978 and 1980. In the 1968 regulations, the Secretary stated:

> Medical considerations alone can justify a finding that the individual is not under a disability where the impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities.

33 Fed. Reg. 11749, 11750 (1968) (emphasis added); see also Brady v. Heckler, 724 F.2d 914, 918 (11th Cir. 1984). Thus, as the Secretary originally conceived it, the severity regulation screened out only individuals with minor ailments.

In 1978, the Secretary amended the regulation to state that an impairment which did not significantly limit an individual's ability to perform "basic work-related functions" would not be considered severe. The regulation further provided that a claimant with such an impairment would be denied benefits without consideration of his

or her age, education, or work experience. Salmi v. Secretary, 774 F.2d 685, 691 (6th Cir. 1985), quoting 43 Fed. Reg. 55349, 55371 (1978). In commenting on the new regulations, the Secretary stated:

> [T]here is no intention to alter the levels of severity for a finding of disabled or not disabled on the basis of medical considerations alone, or on the basis of medical and vocational considerations.

Salmi, 774 F.2d at 691, quoting 43 Fed. Reg. 55358 (1978).

In 1980, the current regulation was promulgated. As at least one court has found, the 1980 recodification "evinced no change in this expression of the Secretary's intent, 45 F.R. 55574." Chico v. Schweiker, 710 F.20 947 (2d Cir. 1983); see also Salmi, 774 F.2d at 691.

Furthermore, a 1980 statement of the Appeals Council sets forth its policy

regarding findings of severity and concludes that the 1980 regulation:

> was not intended to change, but was merely a clarification of the previous regulatory terms 'slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities ...." In other words, an impairment can be considered as 'not severe' only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience.

Brady v. Heckler, 724 F.2d 914, 919-20 (11th Cir. 1984) quoting Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations (1980).

Thus, under a narrow construction of the regulation, an impairment can be considered not severe only if the impairment is so slight that, regardless of a claimant's age, education, and work experience, it would not affect that particular claimant's

ability to work. See Salmi, 774 F.2d at 691-92; Brady, 724 F.2d at 920. The statement of the Appeals Council, coupled with the Secretary's various statements each time the regulation was promulgated, have persuaded those courts that have upheld the severity regulation that "[t]hough the 1968, 1978, and 1980 regulations use vastly different words to describe severe impairment, the standard has not changed throughout the years," and that the severity regulation should be narrowly construed. Salmi, 774 F.2d at 691; Brady, 724 F.2d at 920; Evans v. Heckler, 734 F.2d 1012, 1014 (4th Cir. 1984); Stone v. Heckler, 752 F.2d 1099, 1101 (5th Cir. 1985).

Social Security Ruling 85-28 purports to implement a de minimis standard. It recites the history of the regulation, Pet. at 37a-40a, and it urges that "great care" should be taken in applying "the not severe

impairment concept." Pet. at 44a.[9] Whether the Secretary is actually implementing a de minimis standard under SSR 85-28 is, however, a factual question to be decided in the district courts.

There is no evidence that the Secretary is implementing the SSR as a way of screening out only those claims based on minor impairments. SSR 85-28 was promulgated only recently, in October, 1985. There is some evidence that even the Secretary does not believe that it

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[9] On the other hand, SSR 85-28 does not clearly adopt the burden of proof rules, and the Secretary questions those rules in his brief to this Court. See supra at 13-16. In fact, one court has held that, having once held the regulation invalid in light of its history and the statistics regarding its application, the Secretary may not apply the regulation and was not presented with an opportunity to develop a de minimis interpretation of the regulation as now written in SSR 85-28 by the decision in Baeder, the previous case. Wilson v. Secretary, 796 F.2d 36, 41-42 (3d Cir. 1986).

will make any difference to the evaluation of the severity of claims. See, e.g., Munoz v. Secretary, 788 F.2d 822, 823 (1st Cir. 1986), where the court rejected the Secretary's contention that SSR 85-28 was not applied to the claimant's case but that if the ALJ had applied the ruling "'the administrative decision would have been the same.'"

Substantial statistical evidence exists, moreover, that shows that even if SSR 85-28 sets out a de minimis policy the Secretary intends to follow, before the issuance of SSR 85-28 "the severity regulation ha[d] become, in practice, more than a de minimis screening device." McDonald v. Secretary, 795 F.2d 1118, 1124 (1st Cir. 1986). The number of claimants denied benefits at step two rose sharply between 1978 and 1982. See supra n.1 (increase from 8.4% to 40.3% found in Baeder and Dixon); McDonald, 795

F.2d at 1124 (increase in step two denials to Massachusetts claimants rose to 25 to 31.4% in 1984 and 1985). The experience of claimants in areas where the application of the severity regulations has been enjoined are similarly telling. In Illinois, before the Johnson injunction was issued, 34.3% of claimants were found disabled. The ratio rose to 52% after the injunction was entered. Similarly, the percentage of claimants allowed benefits on reconsideration rose from 14.8% to 34.1% See Brief of Amici Curiae American Diabetes Association, et al., at 18-19.

Finally, the experience of class members whose claims were reevaluated under the orders of the Dixon, Smith, and Johnson courts show that the regulation was not applied as a de minimis standard during the relevant time periods. Over 40% of the claimants reevaluated under the Dixon and Smith orders, who had been denied benefits

on the grounds that their impairments were not severe, received benefits. Johnson class members were found to be disabled on reconsideration at a rate of about 31%. Id. at 19.

The records in the district courts in which the severity regulation was challenged indicate two steps for this Court to take. First, the Court should remand respondent's claim to the district court for the application of a de minimis standard. Second, the Court should ensure that, no matter how it views the current state of the severity regulation, the relief accorded class members shown in other challenges to the severity regulation to have been injured by the Secretary's use of the severity regulation should not be disturbed. Moreover, those district courts are the forums in which to determine whether SSR 85-28 is in reality implementing a de minimis standard.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed. In the alternative, the severity regulation should be narrowly construed and the case remanded, with instructions to the district court to apply a de minimis standard and to consider whether SSR 85-28 implements a de minimis standard.

Dated: New York, New York
October 6, 1986

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